

# A Much-Needed Shield for Reporters

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Journalists reporting on high-profile legal or political controversies cannot function effectively without offering some measure of confidentiality to their sources. Their ability to do so yields substantial benefits to the public in the form of stories that might otherwise never be written about corruption, misfeasance and abuse of power. A person with information about wrongdoing is often vulnerable to retaliation if exposed as an informant.

Yet it has become almost routine for journalists to be slapped with subpoenas seeking the identity of their sources when their reports make it into print or onto the air. From the Valerie Plame imbroglio and the Wen Ho Lee investigation to the use of steroids by professional baseball players, it is now de rigueur to round up the reporters, haul them before a court, and threaten them with heavy fines and jail sentences if they don't cough up names and details concerning their sources.

Unfortunately, the rules regarding what reporters must disclose, and under what circumstances, remain a hopelessly muddled mess. Ask any reporter today, or his publisher, or his publisher's lawyer, whether a reporter must testify about his sources and you will get a litany of ambiguity. The answer may depend on which court issued the subpoena or the predilections of the judge before whom the reporter is summoned. State courts have their rules and federal courts have another set of standards that differ from one part of the country to another. That means that the journalist cannot tell sources whether promises of confidentiality have any teeth. And that, in turn, means that information vital to the public concerning the integrity of government, or of the national pastime, may never see the light of day.

It certainly doesn't have to be this way. Reporters do not expect to be above the law. But they should be accorded some protection so that they can perform their public service in ensuring the free flow of information and exposing fraud, dishonesty and improper conduct without being exposed to an unanticipated jail sentence. A free society depends on access to information and on a free and robust press willing to dig out the truth and spread it around. This requires some ability to deal from time to time with sources who, for one reason or another, require the capacity to speak freely but anonymously.

This is not a novel or threatening concept. Forty-nine states and the District of Columbia have laws protecting the confidentiality of reporters' sources. The Justice Department has had internal standards providing protection to journalists and their sources for 30 years. Yet no such protection exists in federal law. Thus reporters may be protected if they are subpoenaed in state court, but not protected at all if the same subpoena is issued by a federal court. No one benefits from that patchwork of legal standards.

Congress is moving forward to regularize the rules for reporters, their sources, publishers, broadcasters and judges. The Senate Judiciary Committee will soon take up a bill entitled the Free Flow of Information Act of 2006, sponsored by a bipartisan group of legislators and modeled in large part on the Justice Department guidelines. It does not provide an absolute privilege for confidential sources, but it does require, among other things, that a party seeking information from a journalist be able to demonstrate that the need for that information is real and that it is not available from other sources. Matters involving classified information and national security are treated differently. The current controversy over publications relative to the administration's efforts to deter terrorists does not, therefore, provide any basis for delaying or rejecting this needed legislation.

This legislation is long overdue and should be enacted. It will not, contrary to its opponents' arguments, hamper law enforcement. The 49 states and the District of Columbia that have such protection have experienced no diminution of law enforcement efforts as a result of these shield laws. Nor will it give reporters any special license beyond the type of common-sense protection we already accord to communications between lawyers and clients, penitents and clerics, doctors and patients and among spouses -- where we believe that some degree of confidentiality of communications furthers broad social goals.

The same is true for journalists and their sources. We all know of stories that we might never have heard but for hard-working reporters who were able to pry vital information from reluctant sources. Watergate, of course, is the most memorable and important example, but others occur every day.

There is utterly no value served by the current state of confusion regarding when a meaningful promise of confidentiality may be made, or when it will simply be a prelude to a jail sentence for a conscientious reporter.

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